



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**JUN 18 2014**

Michael J. Shepard, Esq.  
55 Church Street  
Pittsfield, MA 01201

RE: MUR 6520

Dear Mr. Shepard:

On December 28, 2011, the Federal Election Commission notified your client, Berkshire County Board of Realtors, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your client, the Commission, on June 10, 2014, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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6 **RESPONDENTS:** National Association of Realtors  
7 Massachusetts Association of Realtors  
8 Berkshire County Board of Realtors  
9

**MUR: 6520**

10 **I. INTRODUCTION**

11 This matter was generated by a complaint filed with the Federal Election Commission by  
12 Marguerite De Santis, alleging violations of the Federal Election Campaign Act of 1971, as  
13 amended ("the Act"), by the National Association of Realtors, Massachusetts Association of  
14 Realtors, and Berkshire County Board of Realtors. *See* 2 U.S.C. § 437g(a)(1).

15 Complainant Marguerite De Santis, a real estate broker representing buyers in Berkshire  
16 County, Massachusetts, alleges that the National Association of Realtors ("NAR") and its state  
17 and local affiliates plan to increase membership dues to fund NAR's lobbying and political  
18 activities, including "the direct support of candidates." She contends that her business would be  
19 impaired because she cannot "do the best job for the [b]uyers" without access to the local  
20 Multiple Listing Service ("MLS") system in Berkshire County where she operates.<sup>1</sup> The  
21 Berkshire County Board of Realtors (the "Board") limits access to that system only to those who  
22 are members of the Board, the Massachusetts Association of Realtors ("MAR"), and NAR and  
23 who pay the challenged dues. She therefore asserts that she either must pay the challenged dues  
24 or suffer a financial injury, alleging that the additional dues may be coercive in violation of the  
25 Act and Commission regulations.

26 Respondents acknowledge that beginning in 2012 NAR's membership dues increased by  
27 \$40 and that NAR will use a portion of that increase for political activity, including independent

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<sup>1</sup> Compl. at 1 (Dec. 13, 2011).

1 expenditures. Disclosure reports filed with the Commission show that since 2010 NAR has been  
2 using its general treasury funds to make contributions to the National Association of Realtors  
3 Congressional Fund (the "Congressional Fund"), an FEC-registered independent expenditure-  
4 only committee ("IEOPC").

5 Based on the specific conduct at issue in this matter, the Commission concludes that  
6 pursuing this matter further would not be an efficient use of the Commission's resources and,  
7 thus, exercises its prosecutorial discretion to dismiss this matter.

## 8 **II. FACTUAL BACKGROUND**

9  
10 NAR is a trade association and an Illinois incorporated voluntary membership  
11 organization, exempt from federal income tax under Section 501(c)(6) of the Internal Revenue  
12 Code.<sup>2</sup> As a voluntary membership organization, NAR files reports with the Commission  
13 disclosing its communication costs.<sup>3</sup> NAR also has a separate segregated fund ("SSF"), the  
14 National Association of Realtors Political Action Committee ("NARPAC"), and in September  
15 2010 NAR established an IEOPC, the Congressional Fund. Both committees are registered with  
16 the Commission. According to its disclosure reports, the Congressional Fund receives all of its  
17 contributions from NAR's general treasury and lists NARPAC and the SSFs of several state  
18 associations of realtors as affiliated committees.<sup>4</sup> The Congressional Fund disclosed receiving  
19 \$4.28 million in contributions from NAR from 2010 through 2013.<sup>5</sup>

<sup>2</sup> NAR Resp. at 1 (Jan. 23, 2012).

<sup>3</sup> 2 U.S.C. § 431(9)(B)(iii) (requiring membership organizations (including labor organizations) and corporations to disclose costs for express advocacy communications).

<sup>4</sup> See Congressional Fund, Statement of Organization at 3-8 (Nov. 12, 2010).

<sup>5</sup> See 2010 Year-End Report at 4 (Jan. 6, 2011) (\$1,105,625.16 in contributions); 2011 Year-End Report at 3 (Jan. 25, 2011) (\$607.60 in contributions); 2012 Year-End Report at 3 (Jan. 22, 2013) (\$3,176,353.60 in contributions); 2013 Year-End Report at 3 (Jan. 16, 2013) (\$617.28 in contributions).

1 NAR is affiliated with state-level associations of realtors in every state, as well as local  
2 associations that are affiliated with both NAR and the relevant state association.<sup>6</sup> Respondent  
3 MAR is a state association affiliated with NAR and the Board is a local association affiliated  
4 with NAR and MAR.<sup>7</sup> Both MAR and the Board are Massachusetts incorporated voluntary  
5 membership organizations exempt from federal income tax under Section 501(c)(6) of the  
6 Internal Revenue Code.<sup>8</sup>

7 The MLS is a collective database of real estate listings owned and controlled by local  
8 chapters of NAR. Most, but not all, local chapters require membership — and thus, payment of  
9 NAR membership dues — to access the corresponding local MLS system.<sup>9</sup>

10 De Santis is a buyer-broker in Berkshire County, Massachusetts and a member of the  
11 Board, MAR, and NAR.<sup>10</sup> De Santis alleges that the Board requires the payment of NAR  
12 membership dues to access the MLS system and, without access, her business would be  
13 impaired, specifically her ability to “access the listings of [her] colleagues for [her] [b]uyer  
14 [c]lients and do the best job for the [b]uyers.”<sup>11</sup>

15 According to the Complaint, in “late spring” 2011, the Board informed its members that  
16 NAR planned to transform itself from a trade association into a “political lobbying and campaign

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<sup>6</sup> See <http://www.realtor.org/realtororg.nsl/pages/whoisarealtor> (Apr. 5, 2011).

<sup>7</sup> MAR Resp. at 1 (Jan. 18, 2012); Board Resp. at 1 (Jan. 18, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> NAR’s restricted access to the MLS has been challenged on antitrust grounds in state and federal courts. In 1991, the Eleventh Circuit held that restricting MLS access constituted an illegal group boycott and tying arrangement if the MLS had “market power” in a relevant geographic market. See *Thompson v. Metropolitan Multilist-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991). NAR subsequently changed its policy to permit the regional MLS services to decide whether to provide access to non-members.

<sup>10</sup> Compl. at 1.

<sup>11</sup> *Id.*

contributing group.”<sup>12</sup> Submitted with the Complaint are documents NAR created in 2011 regarding its “Realtors Political Survival Initiative.” According to those materials, NAR intended to become “America’s most powerful advocacy organization” by, among other measures, making independent expenditures to promote federal candidates.<sup>13</sup> NAR would finance this initiative with a \$40 dues increase, and it planned to spend a total of \$3.59 million in independent expenditures.<sup>14</sup> A part of each NAR member’s dues — averaging \$3.42 a year — would be used to fund the independent expenditures.<sup>15</sup> The NAR board of directors approved the increase in May 2011, and it took effect beginning in 2012.<sup>16</sup>

De Santis contends that she and many other members opposed NAR’s initiative.<sup>17</sup> She claims she has no choice but to pay the dues so that she can access the MLS, although she does not want any part of her dues payment to be used for political purposes: “I do not want to be in this political group but, I will not be allowed to access the MLS unless I join and pay my full amount . . . a large chunk [*sic*] going into politics. I feel that this is a form of extortion and I will be restrained from carry [*sic*] on my business unless I join the Board of Realtors and pay this extra money.”<sup>18</sup> She further asserts that she should be afforded the opportunity to opt-in or -out

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<sup>12</sup> *Id.*

<sup>13</sup> *See id.*, Attach. A.

<sup>14</sup> *Id.*, Attach. B.

<sup>15</sup> *See* Compl., Attach. B (Political Survival Initiative Chart).

<sup>16</sup> *See* NAR Resp. at 1 (acknowledging that the \$40 increase took effect beginning in 2012).

<sup>17</sup> Compl. at 2.

<sup>18</sup> *Id.*

1 of the program: "Shouldn't there be some sort of check-off card for me to APPROVE of this use  
2 of my dues for political purposes? . . . Political purposes that I have had no say in formulating."<sup>19</sup>

3 Respondents NAR, MAR, and the Board each filed separate but essentially identical  
4 responses. Respondents acknowledge that dues for NAR membership were increased \$40  
5 beginning in 2012, and that NAR intends to use some or all of the dues increase for lobbying and  
6 political activity.<sup>20</sup> Respondents assert, however, that after the Supreme Court's decision in  
7 *Citizens United v. FEC*, 588 U.S. 310 (2010), none of these activities violates the Act.

8 Respondents provide an affidavit of Timothy A. Ryan, Managing Director and Chief of Staff to  
9 NAR's Senior Vice President for Community and Political Affairs. Ryan asserts that NAR will  
10 use treasury funds (and thus membership dues) specifically to support, among other things,  
11 "'independent expenditures' as defined in the Act."<sup>21</sup> Respondents further aver that none of the  
12 funds will be used to make direct or indirect contributions to federal candidates or committees.

### 13 III. ANALYSIS

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15 The Complaint alleges that the Respondents are "forcing" her to provide funds to NAR  
16 for independent expenditures that she does not support.<sup>22</sup> She argues that, because she must have  
17 access to the MLS to "do the best job" for her clients, she has no choice but to pay the increase in  
18 dues that will be used to finance independent expenditures.<sup>23</sup> The Respondents do not address  
19 whether access to the MLS is essential for De Santis to engage in her employment as a real-  
20 estate broker.

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<sup>19</sup> *Id.*

<sup>20</sup> NAR Resp. at 1; MAR Resp. at 1; and the Board Resp. at 1-2.

<sup>21</sup> Ryan Aff. ¶ 4.f.

<sup>22</sup> Compl. at 1-2.

<sup>23</sup> Compl. at 2.

1 The Commission has broad discretion to determine how to proceed with respect to  
2 complaints. *See Heckler v. Chaney*, 470 U.S. 821 (1985). "Pursuant to the exercise of its  
3 prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit  
4 further use of Commission resources, due to factors such as the small amount or significance of  
5 the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an  
6 investigation, or when the Commission lacks majority support for proceeding with a matter for  
7 other reasons." Statement of Policy Regarding Commission Action in Matters at the Initial Stage  
8 in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546. Based on the specific conduct alleged  
9 here, including the payment of standard dues to a voluntary membership organization in  
10 exchange for services that the member perceives as a benefit to her business, the Commission  
11 concludes that pursuing this matter further would not be an efficient use of the Commission's  
12 resources. Thus, the Commission exercises its prosecutorial discretion to dismiss this matter. *See*  
13 *Heckler*, 470 U.S. 821.